FILE COPY

SUPREME CT., U. S.
FILED
AUG 4 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-152

WILLIAM R. MING, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF A GROUP OF CONCERNED MEMBERS OF THE ILLINOIS BAR AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI.

ALEX ELSON,
11 South LaSalle Street,
Chicago, Illinois 60603,

WALTER T. FISHER,
135 South LaSalle Street,
Chicago, Illinois 60603,

BEN W. HEINEMAN,
400 West Madison Street,
Chicago, Illinois 60606,

ALBERT E. JENNER, JR.,
135 South LaSalle Street,
Chicago, Illinois 60603,

HARRY KALVEN, JR.,
The Law School
University of Chicago,
Chicago, Illinois 60637,

STANLEY A. KAPLAN,
The Law School,
University of Chicago,
Chicago, Illinois 60637,

MORRIS I. LEIBMAN,
One First National Plaza,
Chicago, Illinois 60670,

MAURICE ROSENFIELD,
208 South LaSalle Street,
Chicago, Illinois 60604,

THOMAS P. SULLIVAN,
135 South LaSalle Street,
Chicago, Illinois 60603.

TABLE OF AUTHORITIES.

Cases.

	PAGE
Abdul v. United States, 254 F. 2d 292 (9th Cir. 1958).	6
Edwards v. United States, 375 F. 2d 862 (9th Cir. 1967)	3
Haner v. United States, 315 F. 2d 792 (5th Cir. 1963).	6
Murdock v. United States, 290 U. S. 389 (1933)	3, 5
Ripperger v. United States, 248 F. 2d 944 (4th Cir. 1957)	3
Sansone v. United States, 380 U. S. 343 (1965)	5
Spies v. United States, 317 U. S. 492 (1943)	5
United States v. DiSilvestro, 147 F. Supp. 300 (D. C. Pa. 1957)	3, 4
United States v. Doelker, 327 F. 2d 343 (6th Cir. 1964)	3
United States v. Fahey, 411 F. 2d 1213 (9th Cir. 1969).	3, 6
United States v. Fullerton, 189 F. Supp. 211 (D. C. Md. 1960)	3, 4
United States v. Goodman, 190 F. Supp. 847 (1961) ..	3
United States v. Gorman, 393 F. 2d 209 (7th Cir. 1968)	3
United States v. Hartman, 409 F. 2d 198 (3rd Cir. 1969)	6
United States v. Johnson, 386 F. 2d 630 (3rd Cir. 1967)	3
United States v. MacLeod, 436 F. 2d 947 (8th Cir. 1971)	3
United States v. Palermo, 259 F. 2d 872 (3rd Cir. 1958)	6
United States v. Perna, 197 F. Supp. 853 (D. C. Conn. 1961)	3
United States v. Platt, 435 F. 2d 789 (2nd Cir. 1970).	6, 9
United States v. Vitiello, 363 F. 2d 240 (3rd Cir. 1966).	6

Other Authorities.

Orlando, "Willfully" Under Section 7203 of the Internal Revenue Code of 1954, 74 Dickinson Law Review 563 (1970) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-152.

WILLIAM R. MING, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF A GROUP OF CONCERNED MEMBERS OF THE ILLINOIS BAR AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI.

INTERESTS OF THE AMICI.

William Robert Ming, Jr. has been a member of the Illinois bar for 39 years. His professional career has included service as a Professor of Law at Howard University and at the University of Chicago, national distinction as a leader in the civil rights movement, a major role in the great days of constitutional litigation by the NAACP, and broad experience and eminence as a trial lawyer. He was charged on April 15, 1970 in a four-count information under Section 7203 of the Internal Revenue Code for the misdemeanors of failing to file his income tax returns for the years 1963 through 1966 by the April 15 deadline for them.

The returns for all four years were in fact filed by him and the taxes required under them paid in full well before criminal prosecution was begun or intimated (Tr. 264, 306, 566; Defendant's Exhibits 2-5, 8, 16). Indeed, the returns and payments for the years 1964 to 1966 inclusive were in the government's hands two and a half years before criminal charges were brought (Tr. 146-148). The criminal proceeding filed on April 15, 1970 raised no questions about Ming's tax returns or payments for 1967, 1968 or 1969 (R. 2).

Mr. Ming was convicted on each of the four counts, after a jury trial, and sentenced by District Judge Hoffman to serve four months in prison consecutively on each count and to pay a fine of $1,250 on each. The total penalty for his misdemeanors of filing late tax returns thus amounts to 16 months in prison and a fine of $5,000.

The undersigned *amici curiae* interested themselves in this case because of their regard for and concern about a distinguished colleague at the bar whose long career demonstrates courage, compassion, professionalism and commitment to *pro bono publico* work in the highest traditions of the bar.[1] Upon looking into this case, we have become convinced that a fundamental error has been committed. This error arises directly from the difficulties in interpretation of the key word "willfully" in Section 7203 under which Ming was tried and convicted. These difficulties have led, in our opinion, to a sharp split among the Circuits. Our reflections on the case and our discussions among ourselves have led us to a further point unanticipated by us at the start. We are now persuaded that there is a basic and disturbing confusion underlying this part of the crimi-

1. At his trial, eminent witnesses testifying to his character, reputation and the nature of his professional work included among others Edward H. Levi, Ray Wilkins, Ramsey Clark, Martin Luther King, Sr., Mahalia Jackson and Msgr. John Egan.

nal provisions of the Internal Revenue Code requiring scrutiny and clarification by the Supreme Court of the United States which has not looked at this problem since it did so in an atypical, abstract context 40 years ago in *Murdock* v. *United States*, 290 U. S. 389 (1933). Our *amicus* brief is therefore the product of twin concerns—one for our colleague, William R. Ming, Jr., and the other for the rational administration of the income tax system.[2]

---

2. Failure to file income tax returns does not at first seem very puzzling behavior; it seems easily understood as the first step in a strategy to evade taxes and to defraud the government. But the deeper one reflects on the problem, and the more one reads the cases, the more uneasy one is about this assumption and the more perplexing the behavior of non-filing becomes.

We are familiar with the tax difficulties of Edmund Wilson and Dean James Landis, surely among the most distinguished and productive men of their generation.

In reviewing tax misdemeanor cases, we have been struck by the disproportionate number which involve lawyers. *See e.g.*, *United States* v. *Fahey*, 411 F. 2d 1213 (9th Cir. 1969); *United States* v. *Gorman*, 393 F. 2d 209 (7th Cir. 1968); *Edwards* v. *United States*, 375 F. 2d 862 (9th Cir. 1967); *Ripperger* v. *United States*, 248 F. 2d 944 (4th Cir. 1967); *United States* v. *Perna*, 197 F. Supp. 853 (D. C. Conn. 1961); *United States* v. *Goodman*, 190 F. Supp. 847 (D. C. Ill. 1961); *United States* v. *Fullerton*, 189 F. Supp. 211 (D. C. Md. 1960); *United States* v. *DiSilvestro*, 147 F. Supp. 300 (D. C. Pa. 1957); *United States* v. *MacLeod*, 436 F. 2d 947 (8th Cir. 1971). See also *United States* v. *Doelker*, 327 F. 2d 343 (6th Cir. 1964) (certified public accountant); *United States* v. *Johnson*, 386 F. 2d 630 (3rd Cir. 1967) (architect).

On reflection, the non-filing of returns does not seem realistic as a long-term strategy for evading taxes to anyone at all familiar with the working of the system such as lawyers. Once a person at any point in his career has filed a return and thus identified and fixed himself within the records of the tax system, the arrangements for information returns and modern record-keeping make it virtually certain that a strategy of non-filing over any long period of time must fail. Moreover, failure to file makes an unusual crime in the sense that once committed it becomes highly predictable that it will be repeated in subsequent years, since the filing in a later year incriminates for the prior year. On the other hand, it becomes evident from the data in the reported cases and from introspection that a man under psychological pressures, in a variety of forms, might miss a first

In the proceeding in the court below, both the government and the court acknowledged the *amicus* brief filed by us. The government responded to it at length in its brief and the court devoted several pages of its opinion to our concerns.

We are filing herewith the consent of both of the parties to our appearance here as *amici*.

---

tax deadline hoping to make amends in the future, and then find it increasingly difficult to bail himself out of the situation he has created. In this connection, the *Fullerton* and *DiSilvestro* cases especially deserve a close reading.

We do not profess to understand what moves men to fail to file income tax returns; but we are persuaded that some substantial number of them at least are led to do so for perplexing and complex reasons which bear no resemblance to a conscious desire to cheat the government and other taxpayers. In any event, these puzzles as to the underlying psychology of the non-filer makes it all the more urgent that the criminal intent required under Section 7203 be thoughtfully and rigorously defined.

ARGUMENT.

I.

There Is a Conflict in the Circuits.

It is a commonplace, and a great achievement, that the United States income tax system is essentially a system of self-assessment by millions of individual taxpayers. The reliance on self-assessment is buttressed by a scheme of sanctions both civil and criminal. The capstone of the sanctioning system is the felony of tax fraud found in Section 7201 of the Internal Revenue Code. See *Spies* v. *United States*, 317 U. S. 492, at 497 (1943). The civil sanctions, themselves formidable, consist basically of percentage additions to taxes in arrears which accelerate steeply the effective rate of tax. As a third wing of the enforcement strategy, there are the misdemeanor provisions of Section 7203. It is the misdemeanor and the misdemeanor only that is involved in this case.

Section 7203 in fact specifies four different types of conduct, each of which is a tax misdemeanor: failure to pay the tax or quarterly estimates thereof; failure to file a return; failure to keep records; and failure to supply information. To make each of these a crime, the statute requires that it be done "willfully."

All this looks reasonable and sensible on its face as a modest supplement to the civil sanctions and the felony sanction. In fact, however, almost from its inception, the statute has been in trouble over the meaning of "willfully," the key term for the requisite state of mind. *Murdock* v. *United States*, 290 U. S. 389 (1933); see also *Spies* v. *United States*, 317 U. S. 492 (1943); *Sansone* v. *United States*, 380 U. S. 343 (1965). A sharp split between the Circuits as to how to handle "willfully" has developed

and endured to this day. See *United States* v. *Fahey*, 411 F. 2d 1213 at 1214 (9th Cir. 1969) discussing the difference between the Ninth, Third and Fifth Circuits and even divisions within the Circuits, citing *Abdul* v. *United States*, 254 F. 2d 292 (9th Cir. 1958), *Haner* v. *United States*, 315 F. 2d 792 (5th Cir. 1963), *United States* v. *Vitiello*, 363 F. 2d 240 (3rd Cir. 1966), *United States* v. *Palermo*, 259 F. 2d 872 (3rd Cir. 1958). See also *United States* v. *Hartman*, 409 F. 2d 198 (3rd Cir. 1969). For a summary of these differences, see Orlando, *"Willfully" Under Section 7203 of the Internal Revenue Code of 1954*, 74 Dickinson Law Review 563 (1970). The Second Circuit has also explicitly acknowledged the conflict in *United States* v. *Platt*, 435 F. 2d 789 at 795 (2nd Cir. 1970).

Although the difference between the Circuits has its nuances, essentially the tension is between, on the one hand, the view of the Third and Fifth Circuits that "willfully" requires a state of mind approaching an intent to evade taxes and, on the other hand, the view of the Ninth, Seventh and Second Circuits that "willfully" reduces to simple consciousness that a deadline was missed otherwise than through mistake, negligence or the like.

II.

The Facts Here and Inconsistent Rulings Below Make This the Appropriate Case in Which to Resolve the Conflict.

This case is sharply set apart from the other income tax misdemeanor cases by the fact that for the years charged, the returns were filed and the taxes paid well prior to the time the prosecution was initiated.

Suspecting quite understandably that no jury would convict of a *tax crime* a defendant who had *in fact filed his returns and paid his taxes* prior to the initiation or threat

of the prosecution, the prosecutor strenuously objected to the defendant's proffer of such evidence, insisting that any use of such evidence was "a flagrant attempt to prejudice this jury"! (Tr. 566) The trial court excluded the evidence and was sustained by the Court of Appeals on the rationale that evidence of payment was irrelevant because the statute required only the most minimal intent; it thus reduced the *mens rea* meaning of "willfully" to the utterly nominal matter of consciously missing a deadline.

On the other hand, neither the court nor the prosecutor had the consistency, or indeed the fortitude, to stay with such an interpretation. The government offered some equivocal evidence with respect to non-timely filing of returns in years prior to those charged but barred by the statute of limitations.[3] The objective of this proffer of evidence was to beef up the government's proof of criminal intent. This time both the trial and appellate courts held the evidence admissible on the rationale that it was relevant to show the requisite criminal intent under the statute. Both courts were thus led into *inconsistent constructions of*

3. The evidence consisted solely of the testimony of a government clerk who stated that she confined her inquiry to searching a single index which covered only returns filed by April 15 of each year (Tr. 247-249, 253, 258-265). This index could not tell her anything about whether returns had been filed *later*, say on April 16 of each year (Tr. 261-262), nor could it tell whether taxes had been *paid* for any year. On the basis of her testimony, it is impossible to distinguish between *non-filing* and *late* filing, nor could it possibly tell anything about the circumstances with respect to the intent or willfulness of an individual taxpayer. The limitations of her testimony are indicated by the absurdity that she testifies that her index shows the non-filing of returns which were at that moment in fact in the hands of the very official of the Internal Revenue Service who directed her search to be made (Tr. 296-304). In these circumstances, the unqualified certification of Exhibit 1—which was given to the jury over objections—seems to us to be shockingly misleading.

the same term "willfully" in the same statute for different pieces of evidence offered in the same trial.

In the handling of this question, the court below adopted for one purpose the minimum intent rule of the Ninth, Second and Seventh Circuits but for another purpose utilized the substantial intent rule of the Fifth and Third Circuits. The point runs deeper than the obvious fact that the defendant got the worst of both worlds and the government the best of both. It serves to highlight the deep difficulties and confusions now attending the construction of the word "willfully" in Section 7203. The confusion is a general one not confined to this case; in light of the prevalence of the income tax today, intervention by the Supreme Court is therefore required.

III.

Massive Prosecutor Discretion Should Not Be Relied Upon to Save the Minimum Intent Rule.

We are now persuaded that the problem of the construction of "willfully" cannot be solved simply by adopting the minimal intent interpretation as the Seventh Circuit has done in this case.

It is a matter of common knowledge that thousands of income tax returns are filed late each year although presumably in almost all instances, the taxpayer knew what time it was. Moreover, as Section 7203 is drafted, the term "willfully" covers in identical language also the misdemeanor of late filings and late payments of estimated quarterly installments. Deadlines must in fact be passed in tens of thousands of such estimate cases each year. The radical difficulty with the nominal intent rule is that such a reading of the statute sweeps within the reach of the criminal sanction conduct which no one dreams of pur-

suing as criminal. Would anyone wish to characterize as criminal the filing of a return on May 15 instead of April 15 accompanied by a full payment of the tax due? Would anyone want to characterize as criminal the failure to pay a quarterly estimate as scheduled although the tax is paid in full on April 15? The statute so construed thus creates thousands of individual crimes which it trusts the good sense and good will of the Commissioner or the prosecutor not to prosecute and a distinguished federal judge has candidly recognized that this is precisely the way the statute operates in fact. *United States* v. *Platt*, 435 F. 2d 789 at 794 (2nd Cir. 1970). The reliance on official discretion to this extent to give parameters to crime seems to us to be deeply incompatible with the Anglo-American legal tradition. Indeed, it is likely to produce that random and eccentric incidence of punishment in an extreme minority of cases which the Court recently found so disturbing a characteristic of the death penalty. For a professional man, such use of the criminal provisions of the tax law can indeed be the death penalty.

CONCLUSION.

We respectfully urge the Court to entertain the defendant's petition for certiorari so that it may scrutinize and construe this key provision in the pervasively important federal income tax statute.

Respectfully submitted,

ALEX ELSON,
11 South LaSalle Street,
Chicago, Illinois 60603,

WALTER T. FISHER,
135 South LaSalle Street,
Chicago, Illinois 60603,

BEN W. HEINEMAN,
400 West Madison Street,
Chicago, Illinois 60606,

ALBERT E. JENNER, JR.,
135 South LaSalle Street,
Chicago, Illinois 60603,

HARRY KALVEN, JR.,
The Law School
University of Chicago,
Chicago, Illinois 60637,

STANLEY A. KAPLAN,
The Law School,
University of Chicago,
Chicago, Illinois 60637,

MORRIS I. LEIBMAN,
One First National Plaza,
Chicago, Illinois 60670,

MAURICE ROSENFIELD,
208 South LaSalle Street,
Chicago, Illinois 60604,

THOMAS P. SULLIVAN,
135 South LaSalle Street,
Chicago, Illinois 60603.